Supreme Court, U.S.
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001354 FEB 26 2001

No. 00-

IN THE

Supreme Court of the United States

CHERYL STEIN AND
WENDY GOLENBOCK,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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February 26, 2001

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95 pp

QUESTIONS PRESENTED

1. Where petitioner initially asserts her Fifth Amendment right to remain silent when subpoenaed to testify in a proceeding against her brought by the Massachusetts Board of Bar Overseers ("BBO"), but later changes her mind and testifies at length only after and as a result of being explicitly warned that asserting her right to remain silent would result in an adverse inference against her at the BBO proceeding and a risk of disbarment, is such testimony coerced or involuntary such that its subsequent use in her criminal trial is prohibited by the Fifth Amendment prohibition against use of compelled testimony?

2. Where petitioners failed to disclose a piece of real property when filing her bankruptcy petition in 1990 at a time when that property had no sale value over and above its existing liens and cost of sale (mortgage payoff, taxes, and sales commission), and where that same undisclosed property is sold five years later at a profit of $73,906.66 after mortgage, tax, and sales commission payoffs, and that entire profit is turned over to the bankruptcy estate for the creditors, is it error under the Sentencing Guidelines to find, as did the court below, that while there was no actual loss to the creditors in bankruptcy, the intended loss for Sentencing Guideline purposes was the full $73,906.66, without deducting from that supposed intended loss all of the mortgage, tax, insurance, and other payments (amounting to approximately $70,000.00) which petitioners

made during the five-year period on the property and which the bankruptcy creditors themselves would have had to pay had the property been disclosed in 1990 and turned over to the bankruptcy court?

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OPINION BELOW

The decision of the Court of Appeals for the First Circuit is reported as *United States* v. *Stein*, 233 F.3d 6 (2000) and is reproduced in the Appendix ("App.") at App. 1a-42a. The district Court opinion affirmed by the First Circuit is not reported, but is reproduced at App. 43a-50a.

JURISDICTION OF THIS COURT

The decision and judgment of the Court of Appeals sought to be reviewed were filed on November 28, 2000. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254.

STATUTES INVOLVED

The relevant portion of the Fifth Amendment provides:

> No person . . . shall be compelled in any criminal case to be a witness against himself . . . .

The bankruptcy fraud statute under which petitioners were convicted and sentenced, 18 U.S.C. § 152(a), provides:

> Anyone who-
>
> knowingly and fraudulently conceals from a custodian, trustee, marshal, or other officer of the court . . . any property belonging to the state of the debtor . . .
>
> shall be fined under this title or imprisoned . . . .

Petitioners were also convicted of conspiracy to commit bankruptcy fraud, and the conspiracy statute 18 U.S.C. § 371, provides:

> If two or more persons conspire either to commit an offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such person do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned, not more than five years, or both.

This petition also challenges the application by the courts below of Sentencing Guideline provision used for determining the Offense Level in fraud cases, Sentencing Guideline 2F1.1, and certain Application Notes and Commentary related thereto. Given their length, and pursuant to Rule

14(f) of the Rules of this Court, they are reproduced in the Appendix at App. 51a-57a.

STATEMENT OF THE CASE

A. *Conviction, Sentence And Appeal*

Petitioners Wendy Golenbock and Cheryl Stein were convicted by a jury of conspiring to commit and committing bankruptcy fraud by jury verdict rendered on April 12, 1999. On July 8, 1999 petitioners were each sentenced to serve a prison term of 21 months. They appealed both the conviction and the sentence to the First Circuit Court of Appeals and that appeal was denied by Judgment entered on September 28, 2000.

B. *Background*

1. The Charged Bankruptcy Fraud

The Indictment charged Golenbock and Stein, along with co-defendant Otis, with bankruptcy fraud and conspiracy to commit that fraud, alleging the following criminal wrongdoing:

> The defendants . . . did knowingly and fraudulently conceal from creditors in bankruptcy property belonging to the estates of the debtors WENDY B. GOLENBOCK and CHERYL B. STEIN, to wit, their bene-

> ficial interest in the real property located on Bond Street in Wellfleet, Massachusetts . . .

As the prosecutor stated this claim in his opening statement:

> . . . the charges are bankruptcy fraud and conspiracy to commit bankruptcy fraud. Defendants Golenbock and Stein owned a second home in Wellfleet, on Cape Cod, concealed that ownership interest from the bankruptcy creditors, and they transferred the title to defendant Susan Otis . . . in trust, to hold for Golenbock and Stein.

2. The Government's Contention That Post-Sale Payments By The Bankrupt Proved Their Guilt

The prosecutor's main proof that the property in reality stayed with Golenbock and Stein and thus that they should have disclosed it to the bankruptcy creditors was the fact that after the transfer to Otis, Golenbock and Stein continued to pay the carrying costs on the property. As explained to the jury:

> The evidence will show that after the deed to Miss Otis was re-

> corded, Golenbock and Stein, not Otis, continued to pay for the — and be responsible for the mortgage, insurance, real estate taxes, telephone, and other expenses of the Wellfleet Property.

[Opening, pp. 51, 52.] (Emphasis added.)

The essence of the prosecutor's contention was that Golenbock and Stein gave only nominal title to the Wellfleet property to a personal friend (co-defendant Otis) in order to conceal Golenbock's and Stein's ownership from the bankruptcy court, and continued to make all the payments on the property, since it really still belonged to them. The central proof offered by the government to show that the property transfer to Otis was not genuine was that appellant Golenbock and Stein continued to pay, as the prosecutor said, "the mortgage, insurance, real estate taxes, telephone, and other expenses of the Wellfleet Property". The prosecutor used these post-sale payments to argue that the government had proved that the sale was a sham since, after all, who pays many tens of thousands of dollars towards mortgage, insurance and taxes on a property for over five years after they have genuinely soled that property to another.

3. The Pre-Trial Motion To Suppress Prior Testimony

Before this criminal case commenced, bar counsel for the Massachusetts Board of Bar Overseers ("BBO") commenced an ethics investigation into certain of the professional conduct of Golenbock. In relation to this investigation, bar counsel sought to examine Golenbock by sworn deposition, and Golenbock ultimately sat for a total of seven BBO deposition sessions. As the district court described the testimonial compulsion issue as it resulted from those deposition sessions:

> In 1995, counsel for the Massachusetts Board of Bar Overseers ("BBO") commenced an ethics investigation into certain conduct of Golenbock. Golenbock was deposed seven times during the investigation. At her second deposition, on the advice of counsel, Golenbock asserted her 5th Amendment privilege against self-incrimination rather than answer certain questions. Later, upon learning that the BBO could draw adverse inferences from her refusal to answer questions and that she risked disbarment as a result of those adverse inferences, Golenbock decided to waive her privilege and testify fully. She now alleges that her full testimony was coerced and is, therefore, inadmissible.

[Order, App. 46a.]

Despite having found unambiguously that Golenbock had chosen to abandon her Fifth Amendment right and thus to testify before the BBO because "she risked disbarment as a result of those adverse inferences if she did otherwise" [App. 46a], the court nonetheless denied the motion because "she was not subject to an automatic disbarment." [App. 48a]. Her BBO testimony was thereafter used extensively during the subsequent criminal trial.

4. The Evidence Relevant To The "Loss" Issue

The government's case revolved around a virtually valueless piece of property (in 1990) and the contention that Golenbock tried to hide it rather than to turn it over and thereafter sold it in 1996 after it had increased in value such that it sold for a approximately $73,000.00 more than its liens.[1]

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[1] That it was valueless in 1990 when the bankruptcy commenced was not disputed. The only expert called to value the property was glowingly referred to by the prosecutor as "the man who has done tens of thousands of real estate appraisals from every branch of the government . . . I mean, this man is an expert, it appears, in doing appraisals." [Closing 19]. This expert testified that the property was worth only $120,000 in 1990 when the bankruptcy commenced and thus when the property should have been disclosed, a value, undisputed proof showed, only a few thousand dollars more than its mortgages, tax liens, and cost of sale. It was worth virtually nothing to the creditors but would have cost about $14,000.00 each year to carry, given the existing carrying costs.

The prosecutor conceded that for five years, Gollenbock and Stein paid all the carrying costs:

> Now Ms. Stein conceded, testified that she and Ms. Golenbock made all the payments for the expenses of the property.

[Closing at 24], and:

> Again, you've seen all those records showing that the payments continued and continued and continued.

[Closing at 39]

The government also showed that when the property was sold by Susan Otis in June of 1996, the sale proceeds over and above the mortgage, taxes and brokerage commission, amounted to approximately $73,000.00 which was given to the creditors.

5. The Sentencing

At the sentencing, the trial court determined that the adjusted offense level was 16, yielding a sentencing guideline range of 21 to 27 months. The Court sentenced Golenbock and Stein each to 21 months. [JNC 2]

The guideline computation derived from the base offense level of 6, an additional 2 for Golenbock's and Stein's role in the offense, an additional 2 for more than minimal planning and more than one victim, and an additional 6 because the Court found that the intended loss was the 1996 sales proceeds of $73,906.66. [Tr. 26.] The value of the sales proceeds was agreed to by all. It is only this latter six-level increase which is challenged on this petition.

As the government stated the unarguable numbers:

> It [the property] sold in 1996 for $175,000.00. After the mortgages were paid off, there was about $70,000.00 [actually $73,906.66] in profit left.]

But the above-quoted proceeds do not take into account the more than five years of carrying costs which had been paid by the Golenbock and Stein while the property grew in value from $120,000.00 in 1990 to the $175,000.00 it sold for in 1996. In challenging the six-point upward adjustment for the supposed loss of $73,906.66, Golenbock and Stein asked the court to consider the economic reality, namely that they had paid out over the five years almost the identical amount that was netted from the property's sale, and this should be considered in relation to the intended loss issue.

The prosecutor urged the court to disregard these payments and declare that the intended loss was the net from sale without deducting any of these costs, because "we've seen what the fruits of the crime were and it amounted to more than &70,000.00." [Tr. 20] Those "fruits" were turned over to the creditors so there was no actual loss; and those "fruits" admittedly do not take into account the virtually equally-valued payments made by Golenbock and Stein over the five-year period before the sale to sustain the property while it grew in value.

The district court sided with the prosecutor and rejected petitioners' plea to include these carrying costs and found that, while "nobody's contending that there was an actual loss" [Sent. at 4], "I find that the intended loss was approximately $74,000.00, the amount of the net gain over the mortgage and expenses . . ." [Tr. 16.].[2] This ignored the virtually equal amount of payments the petitioners made over the five years before the sale, despite the fact that these payments had been the cornerstone of the government's proof during the guilt phase. The 26-month sentences were imposed.

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[2] By mortgage and expenses, the court obviously meant the approximate $100,000 deduction of mortgage and other liens from the gross sales price of $175,000.00, to arrive at the net out of escrow which equaled $73,906.66. The court was obviously not referring to the approximate $70,000.00 payments of the defendants made over five-and-one-half years which they carried the property.

The Appellate Court Decision

The First Circuit affirmed, rejecting Golenbock's contention that her testimony before the BBO was coerced and thus not admissible at her subsequent criminal trial (App. 15a-23a). The First Circuit also affirmed the use of the approximate $73,000.00 sales proceeds as the measure of the intended loss, and held that it need not take into account the equal amount paid out by Golenbock and Stein over the years, and the reality that none of the creditors lost any money (App. 23a-27a). In fact, the creditors gained the entire sales proceeds without having to pay any of the carrying costs which were of virtually equal amount.

REASONS FOR GRANTING THE WRIT

A. *Conflict Between The Circuits And With This Court*

As will be shown below in more detail under Part C. "The First Circuit Holdings In This Case Are Incorrect And At Odds With Other Case Law," the First Circuit decision in this case conflicts with well-settled decisions in other cases.

1. Conflict In Relation To The Self-Incrimination Issue

In relation to Golenbock's Fifth Amendment claim that the BBO testimony was coerced on threat of an adverse inference from silence which put at risk her license to practice law, the First Circuit relied on this Court's decision in *Baxter* v. *United Palmigiano*, 425 U.S. 308, 317, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976). Baxter affirmed a lower court decision allowing the silence of an incarcerated prisoner at a prison disciplinary hearing to be used as an adverse inference against him in deciding the merits of the prison disciplinary charge leading up to that hearing. The First Circuit (below) held that *Baxter* could and indeed had been applied to cases where the testimony thus generated was subsequently used in a criminal case, citing *United States* v. *Indorato*, 628 F.2d 711 (1st Cir. 1980) (App. 22a). In so doing, the First Circuit ignored this Court's prior holdings in *Garrity* v. *New Jersey*, 385 U.S. 493, 87 S.Ct 616, 17 L.Ed.2d 562 (1967) and, indeed, the First Circuit's own prior holdings first in *Gabrilowitz* v. *Newman*, 582 F.2d 1000 (1st Cir. 1978) and later in *United States* v. *Perez-Franco*, 873 F.2d 455 (1st Cir. 1989). See, Part C. below.

2. The Conflicts In Relation To The Loss-Calculation Issue

On the sentencing issue, the First Circuit affirmed the loss calculation premised upon the

sales price of the bankrupt property when sold, without regard for the fact that the petitioners indisputably paid the carrying costs of that property for the five years it was held, thus incurring costs themselves in an amount virtually identical to the price realized at the sale. The creditors received the proceeds of the sale without incurring any of the costs. There was no loss nor any intended loss and the First Circuit decision refusing to deduct the carrying costs conflicts with the Ninth Circuit case of *United States* v. *Allison*, 86 F.3d 940 (9th Cir. 1996) and the Fourth Circuit case of *United States* v. *Baum*, 974 F.2d 496 (4th Cir. 1992), both of which deduct similar payments by the defendants which operate to reduce the loss.

B. *Importance Of The Issues Involved*

1. The Self-Incrimination Issue

The self-incrimination issue goes to one of the core values of our society and one of the settled pillars of our criminal justice system. Whatever civil sanction may be imposed for remaining silent in a civil case or in an administrative or prison hearing, no case prior to this one has allowed testimony coerced by threat of this nature to be used in a subsequent criminal trial. This would erode a protection which has been clear and which has stood the test of time because of its importance to the general prohibition against self-incrimination:

> [T]he American system of criminal prosecution is accusatorial, not inquisitorial, and . . . the Fifth Amendment privilege is its essential mainstay . . . Governments, state and federal, are thus constitutionally compelled to establish guilt by evidence independently and freely secured, and may not by coercion prove a charge against an accused out of his own mouth.

Malloy v. *Hogan*, 378 U.S. 1, 7-8 (1964). (Emphasis added.)[3]

The First Circuit view as expressed below would allow something never before allowed, namely, use in a criminal case of testimony given in a proceeding under threat of a real and imminent sanction, and which, neither decision below disputes, was given only because of that threat.

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[3] The Fifth Amendment protection against compelled self-incrimination has long ago been made applicable to the states by operation of the Fourteenth Amendment. *Malloy* v. *Hogan, supra*, 378 U.S. at 8. State coercion can come from any agency acting under color of state law, including, specifically the disciplinary bodies set up by states to regulate the conduct of lawyers. *Spevack* v. *Klein*, 385 U.S. 511 (1967), holding that the disbarment of a lawyer based solely on his refusal to testify would be an unconstitutional punishment.

The Loss-Calculation Issue

Loss calculation issues are important for different but still-compelling reasons. The very premise of the United States Sentencing Guidelines is "reasonable uniformity of sentencing." *Guidelines Manual, Chapter 1*, Pt. A - *Introduction*, 3. *The Basic Approach (Policy Statement)*, p. 2 (Nov. 2000). Such uniformity simply cannot be achieved if some Circuits take into account the payment of carrying costs on the actual or intended loss calculation and other Circuits do not. Nor is loss calculation a remote event under the guidelines. It is the central feature of a wide variety of fraud cases which dominate the federal criminal law dockets. "Loss is a proxy for the seriousness of the offense." *United States* v. *Parsons*, 141 F.3d 386, 392 (1st Cir. 1998). Its centrality to fraud punishments thus makes uniformity in calculation all the more important.

C. *The First Circuit Holdings In This Case Are Incorrect And At Odds With Other Case Law*

1. The Self-Incrimination Issue

The First Circuit decision in this case holds that an automatic adverse inference was not "coercive" even though, as the district court acknowledged, Golenbock "risked disbarment as a result of those inferences," (A. 20-21.). Such a ruling conflicts with the entire history of cases

holding that coercion can come from all manner of pressures. It may result from classic rubber-hose type violence or from "subtle pressures". *Leyra* v. *Denno*, 347 U.S. 556 (1954). "The question is whether the accused was deprived of his free choice to admit, to deny or to refuse to answer." *Lisenba* v. *People of the State of California*, 314 U.S. 219, 241 (1942). As the First Circuit has likewise ruled:

> The key to this general rule, that the privilege must be claimed when self-incrimination is threatened, is that no penalty accompany the assertion of the privilege. If, however, some identifiable factor is held to deny the individual a "free choice to admit, to deny, or to refuse to answer," that is, if the assertion of the privilege is penalized so as to "foreclos[e] a free choice to remain silent, and therefore . . . compe[l] . . . incriminating testimony," *Garne* v. *United States* [Citation omitted], then the general rule is no longer applicable. [Citation omitted.] In such situations the incriminating disclosures are considered compelled, despite a failure to claim the privilege. [Citation omitted.]

United States v. *Perez-Franco*, 873 F.2d 455, 462 (1st Cir. 1989).

The First Circuit has also specifically applied this general recognition (of the many types of circumstances which can deprive one of his free will) to an adverse inference. *Gabrilowitz* v. *Newman*, 582 F.2d 100 (1st Cir. 1978) notes the reality that creation of an adverse inference is coercive. In *Gabrilowitz* this Court affirmed a lower court order to enjoin a school disciplinary proceeding unless an attorney was allowed to represent the accused student at the proceeding. The basis of the decision was that there was a criminal case pending as a result of the same conduct under review by the school, and due process thus required the presence of a lawyer, so that the student could make decisions about how to conduct the school hearing (including the decision about whether to testify) with a trained eye keeping account of the effect of those decisions on the criminal trial later to be held.

In ruling that a lawyer was needed, however, the *Gabrilowitz* Court noted, in a way quite helpful to Golenbock's position herein, and quite in conflict with the position of the district court in Golenbock's case, that under the procedures applicable at the school, no penalty was attached if the student chose not to testify. *Gabrilowitz* first discussed the *Garrity* line of cases which prohibit sanctions attaching to the assertion of the right to remain silent:

> These cases settle that government cannot penalize assertion of the constitutional privilege against compelled

> self-incrimination by imposing sanctions to compel testimony which has not be immunized.

Gabrilowitz, supra, 582 F.2d at 103. After having focused on the prohibition against such penalties, the court examined the school's procedures found that the school rules attached no sanction to the student's desire not to testify because:

> The [School] procedures . . . state simply: "Decisions shall be based only upon evidence and testimony introduced at the hearing."
>
> * * *
>
> There is no indication that the hearing board will consider the silence of an accused as either pointing to, or being conclusive evidence of, guilt.

Gabrilowitz, 582 F.2d at 103-04. (Emphasis added.)

The underscored language, set as it was in the context of determining whether there was any penalty attached to remaining silent, indicates that a negative inference would indeed be such a penalty. A negative inference is the same as "pointing to" guilt. The *Gabrilowitz* court would obviously not have included the wording "pointing to" in its analysis of those types of procedures

which would be deemed coercive had it not concluded that an inference pointing to guilt was a penalty which would render subsequent testimony coercive.

Garrity, supra, simply does not restrict the general principle (unthreatened choice), recognized in the cases cited above. It simply applies that principle to an obvious, but non-exclusive situation. In *Garrity*, police officers were summoned to appear before a New Jersey State investigative body. They testified only after being warned that if they remained silent they "would be subject to removal from office." *Id.* at 494.

Thereafter these policemen were indicted and tried for criminal violations relating to the issues about which they had been questioned by the investigative body. Over their objections, their prior statements to that investigative body were introduced against them. Their convictions were reversed by this court upon the ground that the testimony had been coerced:

> The choice given petitioners was either to forfeit their jobs or to incriminate themselves. The option to lose their means of livelihood or to pay the penalty of self incrimination is the antithesis of free choice to speak out or to remain silent. . . [and] is likely to exert such pressure upon an individual as to disable him from making a free and rational choice. We think

> that the statements were infected by the coercion inherent in this scheme of questioning and cannot be sustained as voluntary under our prior decisions.

Garrity, supra, 385 U.S. at 497-98.

Garrity goes on to point out that if the choice actually made may be the less painful of the two choices presented, it is nonetheless not voluntarily made:

> Where the choice is "between the rock and the whirlpool," duress is inherent in deciding to "waive" one or the other. It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called.

Garrity, supra, 385 U.S. at 498.

Garrity concludes by noting that on to note that imposition of such a "rock and the whirlpool" choice is similarly unconstitutional when imposed on an attorney:

> We conclude that policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights.
>
> There are rights of constitutional stature whose exercise a State may not condition by the exaction of a price. . . . We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic. Reversed.

Id. at 500.

Golenbock did not face automatic disbarment by remaining silent, but she was faced with an indisputable threat: "she risked disbarment as a result of those adverse inferences." (District Court Order, App 46a.] This risk was clearly a penalty of major proportions scary enough to compel her to abandon her silence even before her knowledgeable attorney added the reality that this would result in "disbarment or suspension." This is enough:

> If, however, a person chooses to answer, it is deemed voluntary because he was free to assert the privilege and would suffer no penalty by so doing. (Citation omitted.) . . . .

Perez-Franco, 873 F.2d 455, 462. This has been the law from the beginning, and *Garrity* simply applied that law to the circumstance at issue. It did not make a rule applicable only to the literal confines of that case, as the First Circuit incorrectly concluded.

The cases cited in the First Circuit opinion court do not sustain the court's conclusion. First, the Circuit Court relies primarily on this Court's decision in *Baxter* v. *Palmigiano, supra*, 425 U.S. 308. But *Baxter* is not applicable to use of testimony in a criminal case. Rather it involves a prison disciplinary proceeding where what is at stake if guilt is found is only at the maximum being assigned to the disciplinary unit for not more than 30 days and the possibility of being classified differently, something nowhere near the serious sanction imposed for silence by Golenbock. More importantly, "[N]o criminal proceedings are or were pending against Palmigiano." [*Id.*, 425 U.S. at 317.] There was thus no issue of using the statement in the very type of proceeding, a criminal trial, for which the privilege was created.

Moreover, in approving the regulation which allows the disciplinary committee to consider the inmate's silence in a prison setting with the above

enumerated maximum punishments at stake, *Baxter* specifically distinguishes the prison's unique setting:

> Disciplinary proceedings in state prisons, however, involve the correctional process and important state interests other than conviction for crime.

Baxter, supra, 425 U.S. at 319.

Nor is the First Circuit's decision below justified by its citation to *United States* v. *Indorato*, 628 F.2d 711 (1st Cir. 1980). In *Indorato*, a state trooper was suspected of being criminally involved with a shipment of stolen property. He spoke to his superiors about the matter under the mistaken and completely uncommunicated belief ("[H]e did not claim the privilege"; *id.* at 717) that, had he not answered the questions involved, he would have been automatically dismissed from the force. There was no such rule.[4] In contrast, Golenbock (1) did suffer a serious consequence, (2) specifically and repeatedly asserted her right to remain silent, (3) only relented after being threatened by the BBO with the state-sponsored adverse inference by which, as the court below ruled, "she risked disbarment" (App. 46a). Golenbock was faced with concrete consequences (an adverse inference leading to disbarment), not the

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[4] In fact, no sanction accompanied his silence, had he chosen to keep it. He was simply incorrect.

uncommunicated "subjective fears" in *Indorato*, 628 F.2d at 716.

These concrete and adverse consequences took away anything like a "free choice" for Golenbock, unless this court tolerates the decided cutback in vigilance for free will signaled by the First Circuit's decision below.

The Loss-Calculation Issue

The court below found that "nobody's contending that there was an actual loss". This was clear since after the Wellfleet property was sold in June, 1996, it realized a net sales price (after mortgage, tax, and brokers fee) of $73,906.66, and that entire amount was held for six months in an account controlled by Golenbock, and then turned over by petitioners to the trustee in bankruptcy.

As to intended loss issue, the district court simply took a snapshot on the date (in 1996) that the property was sold and took (as the intended loss) the net sales proceeds of $73,906.66. However, the court below ignored the virtually equivalent payments made over five and one-half years by petitioners. The snapshot taken by the court was thus completely untethered from the two economic realities surrounding the property: it was valueless when it should have been turned over to the bankrupt estate; and (2) by the time it had increased in value so that it sold for

$73,906.66, that same amount of money had been paid by the petitioners, and would have had to have been paid by the creditors had the property been disclosed. There was no loss not only because the proceeds were turned over to the creditors, but there was no intended loss because petitioners making the payments over the five-and-one-half-year period knew what they were paying as they went along and thus knew they were not going to gain. This economic reality was simply ignored by the courts below.

The First Circuit's affirmance of the district Court's approach conflicts with *United States* v. *Allison*, 86 F.3d 940 (9th Cir. 1996). In *Allison*, defendant defrauded the Bank of Hawaii by producing phony credit cards through the bank's computer system with no bona fide applications. While the defendant ran up charges on four credit card accounts, he also made payments against these accounts. *Id.* at 941-942. The court found the intended loss to be the total charges on the credit cards, less the payments made by the defendant, subsequently giving the defendant credit for the payments he made. *Id.* at 944. In making this determination, the Ninth Circuit reasoned:

> Recently, this Circuit has refused to mechanically apply U.S.S.G. § 2B1.1 (the section cross-referenced by §2F1.1 for the purposes of defining 'loss') and has held that in calculating loss in fraud cases, the court should take a realistic, economic approach to

> determine what losses the defendant truly caused or intended to cause, rather than the use of some approach which does not reflect monetary loss.

Id., at 943. (emphasis added.) The district court's calculation that Golenbock's and Stein's intended loss was $73,906.66 squarely conflicts with the "realistic" or "economic approach" quoted above.

The logic behind crediting a petitioner with their financial contributions is obvious, and certainly found in more sources of authority than the Ninth Circuit case of *Allison, supra.* In 1991, the Sentencing Commission added note 7(b) to the Commentary in §2F1.1 which clarified intended loss by stating that, in fraudulent loan cases, "the amount of intended loss is the amount of the loan not repaid at the time the offense is discovered, reduced by the amount the lender could recover from the collateral". *See, United States* v. *Menichino*, 989 F.2d 438, 440 (11th Cir. 1993). In other words, a defendant should be credited for making payments against the loan prior to discovery of the offense and likewise credited for collateral previously pledged. This nets the real loss, actual or intended. *See, United States* v. *Menichino*, 989 F.2d at 442 (intended loss offset by pledged collateral); *see also, United States* v. *Baum*, 974 F.2d 496 (4th Cir. 1992) (intended loss on loan received by fraudulent means must be reduced by pledged collateral and loan payments made by defendant).

Moreover, while bankruptcy fraud is not one of the exceptions in note 7 of the Commentary to §2F1.1 which would preclude its concomitant loss figure from being calculated pursuant to the definition of loss under §2B1.1 as in loan fraud cases, such an exception is not required for the court to take a realistic, economic approach. *See, Allison, supra,* where the Ninth Circuit applied the logic of note 7(b) to a case not involving loan fraud by subtracting payments the defendant made to his phony credit card accounts from the defendants intended loss figure. In other words, the total amount of fraudulent credit card withdrawals was not the loss; it was the total withdrawals less the monthly repayments defendant made to keep the card active. *Id.* at 943-944.

Golenbock and Stein deserved the same form of analysis in calculating the loss they "intended" to inflict. In fact, their case is more compelling. In none of the loan or credit card fraud cases (where the economic reality of the payments made are taken into account) did the "victims" actually come out ahead of the game as they did in the case below. After all, the creditors of Golenbock and Stein received all the sales proceeds without having incurred any of the five years worth of carrying costs involved. The district court erred in failing to include any of the carrying cost payments in the loss figure, since no loss of $73,906.66 was ever possible, much less intended. The Circuit Court erred in affirming this calculation.

CONCLUSION

This Court should grant certiorari on these important issues for the reasons stated above.

Respectfully submitted,

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Dated: February 26, 2001

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APPENDIX A

United States Court of Appeals
For the First Circuit

UNITED STATES, Appellee,

v.

CHERYL B. STEIN, Defendant, Appellant.

UNITED STATES Appellee,

v.

WENDY B. GOLENBOCK, Defendant, Appellant.

UNITED STATES, Appellee,

v.

SUSAN OTIS, Defendant, Appellant.

Nos. 99-1983, 99-1985 and 99-1987.
Argued June 6, 2000.
Decided November 28, 2000.

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Nathaniel M. Gorton, U.S. District Judge]

Defendants were convicted in the United States Court for the District of Massachusetts, Nathaniel M. Gorton, J., of conspiracy to commit

bankruptcy fraud, and two of them were also convicted of bankruptcy fraud, and they appealed. The Court of Appeals, Levin H. Campbell, Senior Circuit Judge, held that: (1) fact that attorney believed that if she refused to testify before the disciplinary board, she could be subject to an adverse inference, with the practical outcome being her disbarment, did not render her testimony coerced and involuntary and thus inadmissible at her subsequent criminal trial; (2) intended loss calculation was reasonable; (3) there no clear error in addition of two levels to a defendant's base offence level on ground she was an organizer, leader, manager, or supervisor; (4) evidence was sufficient; and (5) count of indictment charging conspiracy to commit bankruptcy fraund was sufficient.

Affirmed.

Kevin S. Nixon for appellant Cheryl B. Stein.

John J.E. Markham, II with whom Markham & Read was on brief for appellant Wendy B. Golenbock.

Richard D. Biggs with whom Marcia G. Shein and the Law Office of Shein & Biggs were on brief for appellant Susan Otis.

Mark J. Balthazard, Assistant U.S. Attorney, with whom Donald K. Stern, United States Attorney, was on brief for appellee.

Before SELYA, Circuit Judge, CAMPBELL, Senior Circuit Judge, and LIPEZ, Circuit Judge.

LEVIN H. CAMPBELL, Senior Circuit Judge.

Defendant-appellants Wendy B. Golenbock, Cheryl B. Stein and Susan B. Otis were each charged in an indictment with one count of bankruptcy fraud in violation of 18 U.S.C. § 152 and one count of conspiracy to commit bankruptcy fraud in violation of 18 U.S.C. § 371. The charges arose from their alleged concealment of Golenbock's and Stein's ownership interest in a summer home in Wellfleet, Massachusetts, which they placed in Otis's name in trust during bankruptcy proceedings. After a jury trial in the district court, Golenbock and Stein were convicted on both counts, and Otis was convicted on the conspiracy count. We affirm the convictions and sentences.

I.

At the time of the bankruptcy proceedings, Golenbock and Otis were lawyers.[1] Golenbock and Stein worked and lived together in Weston, and were, at times, in the business of real estate development and management. Otis was a close personal friend of both.

A. *The Wellfleet property*

On October 5, 1982, Golenbock and a friend named Ellen Ratner purchased a parcel of land on Bond Street in South Wellfleet, Massachusetts

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[1] Stein is now also a lawyer.

("the Wellfleet property") for $18,000.[2] To build a house on the property, they borrowed $56,700 from the Cape Cod Five Cent Savings Bank ("Cape Cod Five"), secured by a mortgage on the property. In 1986, Ratner sold her interest in the Wellfleet property to Golenbock and Stein for $34,050. The Cape Cod Five was notified of the transfer, and released Ratner from the mortgage. Shortly thereafter, Golenbock and Stein obtained an additional $50,000 line of credit from the Cape Cod Five, secured by a second mortgage on the Wellfleet property. Golenbock and Stein used the newly-built house on the Wellfleet property as a vacation home, and sometimes rented it out.

B. *The transfer of the Wellfleet property to Otis*

On September 25, 1990, Golenbock and Stein filed separate Chapter 11 bankruptcy petitions. They did not list the Wellfleet property as an asset in their bankruptcy schedules or in their statement of financial affairs. Neither did Golenbock and Stein list the Cape Cod Five as a creditor of theirs, state that they had conveyed the Wellfleet property to anyone else in the year before bankruptcy, nor identify the Wellfleet property as being held or managed for someone else. Stein did not disclose an ongoing civil action she had brought relating to a hot tub she and Golenbock had had installed at the Wellfleet property.

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[2] Ratner was not involved in this case.

Two days after Golenbock and Stein filed their bankruptcy petitions, Golenbock gave Otis a $15,000 check. On October 4, 1990, a deed was filed with the Barnstable Country Registry of Deeds conveying the Wellfleet property from Golenbock and Stein to Otis (under the name of Alekman) as sole trustee of the B.Z. Realty Trust, for a stated consideration of $108,000. The deed on its face was dated and notarized December 31, 1989. Stein testified at trial that the deed was signed in Andover, Massachusetts -- in Essex County -- on December 31, 1989, but the deed reflects that the signatures were notarized in Middlesex County, where Golenbock and Stein both lived.

At the same time as the deed was recorded, a Declaration of Trust for the B.Z. Realty Trust was also recorded. Two dates appeared on the Declaration as indicating when it was executed: August 1, 1989, and August 1, 1990.

Despite the stated consideration of $108,000, Otis did not pay any such sum to Golenbock and Stein. The mortgagor, Cape Cod Five, was not notified of the transaction. Golenbock and Stein continued to make regular mortgage and line of credit payments, often by postal money orders, bank checks or cash. The postal money orders and bank checks were obtained by employees of Golenbock and Stein, at their instruction and using cash provided by them. Later payments were made using accounts controlled by Golenbock and Stein. They made all the payments until the property was sold in June 1996.

In addition to paying the mortgage, Golenbock and Stein also paid the telephone, electric, and trash pickup bills for the Wellfleet property while it was in Otis's name in trust. The accounts for those bills were changed to Otis's name beginning in 1991. However, the mailing address for the bills always remained Golenbock and Stein's post office box, which Otis did not use. Mail sent to the Wellfleet address was routed to Golenbock's and Stein's offices.

Golenbock and Stein also handled and paid for the insurance on the property after the title was transferred. In June, 1991, a year and a half after the date on the deed to Otis, and nine months after the deed was recorded, Golenbock and Stein applied for new homeowner's insurance for the property in their names only, with no reference to Otis or the Trust. The insurance for the Wellfleet property was designated for personal use, not commercial use. In July, 1991, they had Otis and the Trust added to the policy as additional insureds. Only Golenbock and Stein, however, were insured for the contents of the Wellfleet property and for the loss of use. All the payments made for the Wellfleet property expenses were paid for or directed to be paid by Golenbock and Stein and their handwriting appears on checks and bills relating to those expenses.

Only Golenbock and Stein dealt with the real estate broker for the rental of the property. The income tax forms for the rental were mailed only to Golenbock and Stein's post office box. The tax form for the rent for the year 1990 was issued to Golenbock. The name was changed to Otis in

1991, at Golenbock's direction. Rental income checks from the real estate broker were payable to Otis in 1991, but were endorsed by Golenbock.

C. *Golenbock and Stein's bankruptcy proceedings*

In November, 1990, several weeks after filing their bankruptcy petitions, Golenbock testified under oath at a bankruptcy meeting of creditors ("341 meeting") that she had not conveyed any property within the prior year to an insider or "good friend." She did not include the Cape Cod Five when listing the banks to which she owed money. Stein attended a 341 meeting in 1990, and both Golenbock and Stein attended another 341 meeting in June, 1992. At none of those meetings did either disclose to the representative of the U.S. Trustee's Office, who was conducting their examinations, an ownership interest in the Wellfleet property, its transfer in the year before the bankruptcy, or the existence of the Cape Cod Five debt. Golenbock and Stein's regular reports and cash flow statements submitted to the U.S. Trustee's Office did not reflect the payments they were making in connection with the Wellfleet property expenses.

In November 1991, Golenbock testified in a bankruptcy deposition conducted by one of her creditors. After being confronted with the creditor's knowledge of her prior interest in the Wellfleet property, she admitted that she had owned it. She stated, however, that it had been sold in 1989 to Otis. Golenbock further testified

that she had transferred the property because she could not pay the mortgage.

In 1994, after Golenbock and Stein's bankruptcy cases had been converted to Chapter 7 liquidations, another 341 meeting was conducted, this time by their appointed bankruptcy trustee. Both Stein and Golenbock testified under oath at that meeting. They affirmed that the only property they still owned was their primary residence, and did not disclose any interest in the Wellfleet property. The trustee only learned about their involvement in the Wellfleet property in 1997, when he heard it from the U.S. Trustee's Office.

In April 1995, Golenbock and Stein received their bankruptcy discharges. By August 1995, while title to the Wellfleet property was still in Otis's name in trust, Golenbock and Stein resumed making the mortgage payments directly from Golenbock's bank account. In March, 1996, both bankruptcy cases were closed.

D. *The sale of the Wellfleet property*

In early 1996, Golenbock contacted a real estate broker to list the Wellfleet property for sale. Golenbock and Stein, not Otis, dealt directly with the real estate broker during the sale process. In June 1996, the Wellfleet property was sold for $175,000, and a check for $65,906.66, most of the profits, was issued to Otis. She endorsed it to Golenbock on behalf of Max Golenbock-Stein, Golenbock and Stein's six-year-old son.

Although the funds were deposited in Golenbock's client trust account in Max's name, the account was used for Golenbock and Stein's personal and business purposes. For example, $5,100 was paid from the account to Stein for "New England School of Law," which Stein was attending, and nearly $10,000 in checks were paid from the account to Golenbock personally, for no stated purpose. The account was also used to deposit a $27,500 settlement check received from an insurance company for one of Golenbock's law clients, and to issue the $25,000 disbursement check to the client. The rest of the profits from the sale, in the form of two checks totaling over $8,000, were issued to Otis by the real estate broker. Otis also endorsed those over and they were deposited into Golenbock's master client account.

E. *The B.B.O. testimony*

Before any criminal charges were filed against Golenbock, the Massachusetts Board of Bar Overseers (B.B.O.) initiated an investigation of her professional conduct with regard to a number of matters. On December 21, 1995, Golenbock testified in the first of seven depositions before the Massachusetts Board of Bar Overseers. She did not know of any potential criminal investigation at that time, and answered questions about clients she had represented and the handling of funds, as well as her bankruptcy filing. There were no references to the Wellfleet property in this deposition.

On or around January 11, 1996, before the next scheduled deposition, the B.B.O. notified Golenbock by *letter* that it was concerned about certain aspects of her bankruptcy proceeding. This letter did not mention the Wellfleet property. Golenbock's attorney became concerned about the possibility of a criminal proceeding, and advised her to assert her Fifth Amendment privilege. On April 25, 1996, Golenbock again appeared before the B.B.O. Again, none of the questions referred to the Wellfleet property. Golenbock declined to answer any questions, asserting her Fifth Amendment privilege.

Golenbock then changed attorneys, retaining Edward Barshak for his expertise in B.B.O. practice. Barshak advised her as follows, as recounted in his affidavit:

I told her that if she continued to remain silent, she would be penalized. The penalty would be that the BBO would hold her silence against her. Specifically, the BBO would be allowed to draw from her silence any adverse inferences relating to any area of the investigation she refused to discuss. I also told her that those adverse inferences would mean that the BBO would find against her in relation to those areas of the investigation and that as a result, she would be disbarred or suspended.

On November 1, 1996, Golenbock again appeared before the B.B.O., and this time chose to forego her Fifth Amendment privilege and to answer the questions put to her. She answered additional questions on November 15, 1996. The testimony

in these depositions concerned the Wellfleet property and other matters relevant to the subsequent criminal case against her.

Otis also testified before the B.B.O. on multiple occasions beginning in January, 1996. There, she stated that she became aware of Golenbock's and Stein's bankruptcy filings "at some point." In 1992, Otis had submitted to the Internal Revenue Service a 1991 pleading from Golenbock's and Stein's bankruptcy cases, as well as a copy of the deed, in response to an inquiry concerning her 1992 tax return. Otis also told the B.B.O. that she made none of the mortgage payments and provided none of the funds to do so. However, she and her husband reported the income and mortgage payments on the Wellfleet property in their federal income tax returns for the years 1991-1994. Otis also testified that all the expenses of the Wellfleet property were being paid from its rental income. Her tax returns, however, reflected that there was no rental income for several years. In 1991, the one year in which there was reported rental income, it amounted to less than half of the mortgage payments.

F. The motion to suppress

On March 18, 1998, all three defendants were charged with one count of bankruptcy fraud in violation of 18 U.S.C. § 152 and one count of conspiracy to commit bankruptcy fraud in violation of 18 U.S.C. § 371. A superseding indictment charging the same offenses was returned on August 5, 1998.

The government sought to offer in evidence some of the statements that Golenbock had made to the B.B.O. On July 6, 1998, Golenbock moved to suppress those statements. She contended that she had been coerced to answer questions by the threat that assertion of her Fifth Amendment privilege would be used against her in the B.B.O. proceeding. Stein did not join in the motion or file a separate motion to suppress. In support of her motion, Golenbock submitted her affidavit and that of Barshak, quoted *supra*.

On August 20, 1998, the district court denied Golenbock's motion in a written decision, stating:

> In this case, Golenbock did not face the ominous choice "between the rock and the whirlpool," because, although she was subject to a negative inference based upon her silence, she was not subject to automatic disbarment. Instead, in the B.B.O. proceeding she, like defendants in any civil proceeding, had to choose between remaining silent and risking an adverse inference on the one hand, and giving testimony that could be used against her in a subsequent criminal proceeding on the other. Because Golenbock's testimony was not coerced, as that term is defined in Garrity [v. New Jersey, 385 U.S. 493, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967)], her motion to suppress statements made to the B.B.O. will be denied.

At trial, the government introduced excerpts from thirty-three pages of B.B.O. testimony, which were admitted in evidence against Golenbock. The excerpts included Golenbock's testimony concerning her payment of the mortgage, tax and other payments on the Wellfleet property, as well as the proceeds of the sale of the property. Neither Golenbock nor Stein made a contemporaneous objection.

G. *The criminal trial*

The two-week jury trial of all three defendants commenced in March, 1999. At trial, an expert testified that the value of the Wellfleet property, as of October 4, 1990, was $120,000. There were two mortgages totaling approximately $100,000 and approximately $2,000 worth of tax liens.

By way of defense at the trial, Golenbock and Stein contended that they did not have to list the conveyance of the Wellfleet property in their bankruptcy schedules because the transfer was in the ordinary course of business (i.e. real estate development). After the property was conveyed to Otis, defendants contended, Golenbock managed the property and Stein "looked after necessary repairs and made sure the bills were paid." The mortgage was paid with monies Otis provided to Golenbock in her role as property manager. The main source of income for these payments was the Adams Street Realty Trust, composed of rental properties in Lowell, Massachusetts. Golenbock and Stein had transferred their beneficial interest in those properties to Otis in

November, 1991, with the bankruptcy court's permission. The tenants of the Lowell properties often paid in cash, defendants asserted, which accounted for Golenbock and Stein's cash payments for the mortgage and other expenses associated with the Wellfleet property. Stein was the only defendant who testified at trial.

Stein and Otis moved for acquittal under Fed. R. Crim. P. 29 at the close of the government's case. The court denied both motions.

Neither Stein nor Otis renewed her motion for acquittal after the close of her defense. On April 12, 1999, the jury found Golenbock and Stein guilty of both counts. Otis was convicted on the conspiracy count and acquitted on the substantive bankruptcy fraud count.

H. *Sentencing*

On July 8, 1999, the trial court determined that Golenbock and Stein each had an adjusted offense level of 16. The computation was based on a base offense level of 6, with upward adjustments for their roles in the offense as leaders, supervisors, organizers, or managers of Otis; for more than minimal planning and more than one victim; and for the amount of the intended loss, which was determined to be $73,906.66.

Golenbock and Stein were each sentenced to twenty-one months of imprisonment followed by thirty-six months of supervised release. Otis

received a sentence of five months in prison and twenty-four months of supervised release.

II.

In these consolidated appeals, the defendants advance various arguments. First, Golenbock and Stein assert that the district court erred in not suppressing at trial testimony provided by Golenbock in proceedings conducted by the Board of Bar Overseers. Golenbock and Stein also dispute the court's sentencing enhancement based on the intended loss for which they were responsible. Stein and Otis contend the evidence was insufficient to support their convictions. Stein further maintains that her sentence should not have been enhanced to reflect a leadership role in the offense. Finally, Otis argues that the indictment was deficient as to the charges against her. We find no reversible error as to any of these matters, and affirm the defendants' convictions and sentences.

A. *Golenbock's B.B.O. testimony (Golenbock and Stein)*

Golenbock and Stein both contend that because Golenbock's B.B.O. testimony was coerced, it should have been suppressed at their criminal trial.[3] In reviewing the denial of a motion to suppress, we review the district court's findings of

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[3] Because Steins appeal on this issue is derivative of Golenbocks, we address them together referring only to Golenbock.

fact for clear error, and its conclusions of law and rulings on the constitutionality of the government's conduct de novo. See United States v. Leon-Delfis, 203 F.3d 103, 107 (1st Cir. 2000). Golenbock argues that she reasonably believed that if she refused to testify before the B.B.O., she could be subject to an adverse inference as to the matters at issue in that proceeding, with the practical outcome being her disbarment. She contends that this impending threat of disbarment rendered her testimony involuntary and thus inadmissible at her criminal trial. We think, however, that the penalty of adverse inference and possible disbarment was too conditional to establish a conclusion that her B.B.O. testimony was compelled in contravention of the Fifth Amendment.

The Fifth Amendment secures an individual's privilege "to remain silent unless he chooses to speak in the unfettered exercise of his own will, and to suffer no penalty . . . for such silence." Spevack v. Klein, 385 U.S. 511, 514, 87 S.Ct. 625, 17 L.Ed.2d 574 (1967) (Douglas, J.) (plurality opinion quoting Malloy v. Hogan, 378 U.S. 1, 8, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1963)). The Fifth Amendment not only protects against being involuntarily called as a witness against oneself in a criminal prosecution,

> but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.

Lefkowitz v. Turley, 414 U.S. 70, 77, 94 S.Ct. 316, 38 L.Ed.2d 274 (1973).

The Fifth Amendment has been held to protect individuals from the threat of substantial economic sanction for exercising their rights. See id. at 82-83, 94 S.Ct. 316 (state contractors barred from state business for five years for refusal to testify before grand jury); Gardner v. Broderick, 392 U.S. 273, 88 S.Ct. 1913, 20 L.Ed.2d 1082 (1968) (police officer discharged for refusal to testify before grand jury). In Spevack, the Court held that an attorney's refusal, on grounds of self-incrimination, to produce financial records and to testify at a judicial inquiry in a disciplinary proceeding was not a constitutionally permissible basis for his disbarment. Four members of the court described disbarment as a "costly" sanction within the meaning of the Fifth Amendment, and went on to state: The threat of disbarment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion to make a lawyer relinquish the [Fifth Amendment] privilege. Spevack, 385 U.S. at 516, 87 S.Ct. 625.

On the same day, the Court similarly held that statements elicited as a result of compelling a choice between self-incrimination and the loss of a public job were inadmissible in a later criminal proceeding. See Garrity v. New Jersey, 385 U.S. 493, 498, 87 S.Ct. 616, 17 L.Ed.2d 562 (1967). There, police officers were summoned to appear before a state investigative body examining irregularities in criminal cases. They were informed that anything they said could be used

against them in subsequent criminal proceedings, but if they refused to answer they would be subject to removal from office. Id. at 494, 87 S.Ct. 616. The officers answered the questions. Later, they were indicted and tried for crimes relating to the earlier questioning, and their statements were used at trial. Id. at 495, 87 S.Ct. 616. The Supreme Court reversed their convictions on the ground that their testimony was involuntary because it was under threat of job termination. Id. at 497-98, 87 S.Ct. 616.[4]

Where, however, invocation of the Fifth Amendment does not, by itself, result in forfeiture of the job or license in question, the fact that claiming the Fifth may, as a practical matter, result in damage to one's chances of retaining the privilege at stake does not necessarily establish a constitutional violation. The effect must be "capable of forcing the self-incrimination which the Amendment forbids." Lefkowitz v. Cunningham, 431 U.S. 801, 806, 97 S.Ct. 2132, 53 L.Ed.2d 1 (1977); see also Flint v. Mullen, 499 F.2d 100, 104 (1st Cir. 1974) ("[N]ot every undesirable consequence which may follow from

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[4] Where the government seeks to compel testimony by threat of loss of livelihood, the witness may rightfully refuse to answer unless he is protected against the use of the compelled answers in any subsequent criminal case. *See* United States v. Perez-Franco, 873 F.2d 455, 462 (1st Cir. 1989) (citing Turley, 414 U.S. at 78, 94 S.Ct. 316). A state may compel incriminating answers to its questions, however, if the testimony and its fruits are rendered unavailable for use in subsequent criminal proceedings, i.e. through a grant of immunity. See Turley, 414 U.S. at 84-85, 94 S.Ct. 316.

the exercise of the privilege against self-incrimination can be characterized as a penalty.").

Hence the Supreme Court has adhered to the "prevailing rule" that the Fifth Amendment does not forbid allowing adverse inferences to be drawn against parties to civil actions from their refusal to testify in response to probative evidence offered against them. Baxter v. Palmigiano, 425 U.S. 308, 317, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976). In Baxter, the Court held that permitting the drawing of an adverse inference from a prisoner's silence in a prison disciplinary hearing was constitutionally permissible. See id. at 316-20, 96 S.Ct. 1551. The Baxter court differentiated the effects of the prisoners' silence from the automatic penalties at issue in other cases:

> In this respect, this case is very different from the circumstances before the Court in the Garrity-Lefkowitz decisions, where refusal to submit to interrogation and to waive the Fifth Amendment privilege, standing alone and without regard to the other evidence, resulted in loss of employment or opportunity to contract with the State. There, failure to respond to interrogation was treated as a final admission of guilt.

Id. at 317-18.[5] The Supreme Court later distinguished its holding in Baxter from a case in

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[5] Golenbock points out that in Baxter, there was no pending criminal prosecution, and the State had not sought to make evidentiary use of the inmates silence at the

which, pursuant to a New York statute, an attorney was divested of his state political party offices when he refused to waive his constitutional immunity before a special grand jury:

> Baxter did no more than permit an inference to be drawn in a civil case from a party's refusal to testify. Respondent's silence in Baxter was only one of a number of factors to be considered by the finder of fact in assessing a penalty, and was given no more probative value than the facts of the case warranted; here, refusal to waive the Fifth Amendment leads automatically and without more to imposition of sanctions.

Lefkowitz v. Cunningham, 431 U.S. 801, 808 n.5, 97 S.Ct. 2132, 53 L.Ed.2d 1 (1977).

Relying on Garrity, Golenbock insists that she was forced to choose between her livelihood as an attorney and incriminating herself in the B.B.O. investigation. Unlike the police officers in Garrity, however, Golenbock was not subject to automatic loss of her position if she asserted her right not to testify. While refusal to waive the Fifth Amendment might increase the risk that she would be disbarred, disbarment would not result automatically and without more. Hence, she was not threatened with a "penalty" within the

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disciplinary hearing in any criminal proceeding. See, e.g., United States v. Indorato, 628 F.2d 711, 716 (1st Cir. 1980).

meaning of Garrity for invoking her Fifth Amendment privilege.

Attorney Barshak's affidavit makes this point clear. He stated that "the B.B.O. would be allowed to draw from her silence any adverse inferences relating to any area of the investigation she refused to discuss." (Emphasis added). It is true that Barshak went on to opine to his client that "those adverse inferences would mean that the B.B.O. would find against her in relation to those areas of investigation and that as a result, she would be disbarred or suspended." His prediction of disbarment, however, rested on his estimate of how the B.B.O. would exercise its ability to draw adverse inferences. Mr. Barshak did not suggest that the B.B.O. was required to disbar her as an automatic sanction for Golenbock's failure to waive her constitutional rights.

The B.B.O.'s own rules and practice make it plain that Golenbock was not faced with an automatic sanction. The B.B.O. makes its decisions based on a preponderance of the evidence, with the Bar Counsel bearing the burden of proof. See Rules of the Board of Bar Overseers, § 3.28. Nothing in the record suggests that the B.B.O. has either a formal rule or an unwritten policy or practice to disbar or suspend attorneys simply for invoking Fifth Amendment privileges. Hence, the consequences of Golenbock's assertion of the privilege before the B.B.O. were the same as in any civil proceeding, in that the fact-finder could -- but was not required to -- draw an adverse inference from such an assertion. See Baxter, 425 U.S. at 317, 96 S.Ct. 1551; see also Federal

Deposit Ins. Corp. v. Elio, 39 F.3d 1239, 1248 (1st Cir. 1994).

Golenbock contends, nevertheless, that the risk of disbarment arising from her refusal to testify was sufficiently coercive to render her B.B.O. testimony inadmissible. This argument ignores the reasoning of Baxter, on which this court has relied to distinguish between the threat of automatic loss of one's livelihood and the threat of an inference that might lead to such a loss. In United States v. Indorato, 628 F.2d 711 (1st Cir. 1980), we held that a state police officer's self-incriminating statements made during a theft investigation were not coerced, where nothing in relevant police department rules mandated dismissal for invoking Fifth Amendment rights. We observed:

> In all of the cases flowing from Garrity, there are two common features: (1) the person being investigated is explicitly told that failure to waive his constitutional right against self-incrimination will result in his discharge from public employment (or a similarly severe sanction imposed in the case of private citizens); and (2) there is a statute or municipal ordinance mandating such procedure.

Id. at 716. In Indorato, we said that absent elements of this nature, fear of punishment as a consequence of claiming one's rights does not protect one from the government's subsequent

use of self-incriminating statements in a criminal trial.[6] See id.

As said, there is no evidence of any B.B.O. rule mandating that claiming one's constitutional right to remain silent must necessarily result in disbarment. Golenbock could have asserted her Fifth Amendment privilege and later argued to the B.B.O. fact-finder that the evidence against her, as a whole, was inadequate to warrant disbarment. We conclude that "[n]either Garrity nor any of its progeny brings defendant within the ambit of the coerced testimony doctrine." Indorato, 628 F.2d at 716. We affirm the district court's denial of Golenbock's motion to suppress.

B. *Intended loss calculation (Golenbock and Stein)*

The district court increased Golenbock and Stein's base offense levels by six levels because of the amount of the intended loss for which they were responsible.[7] The court determined that the

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[6] We recognize that Golenbocks fear of disbarment was based on the advice of a seasoned attorney. However, the fact that, as a matter of strategic choice in the B.B.O. proceeding, Golebock could have had good reason to fear disbarment if she did not testify is not the same as being faced with automatic disbarment for failure to testify. One can imagine situations where the adverse inferences drawn from refusing to testify might be overcome by other factors.

[7] The district courts sentence enhancement was based on the loss to creditors Golenbock and Stein intended, not the creditors' actual loss. It is undisputed that the Wellfleet property was ultimately discovered by the

intended loss was approximately $74,000, which it characterized as "the amount of the net gain over the mortgage and expenses." The district court's findings were based on the facts that the Wellfleet property was sold in June, 1996, for $175,000, and that $73,906.66 remained after the mortgages, tax obligation and brokerage commission were deducted from the escrow.

We review a district court's intended loss findings for clear error. See United States v. Robbio, 186 F.3d 37, 43 (1st Cir. 1999); see also United States v. Cali, 87 F.3d 571, 575 (1st Cir. 1996) (clear error standard applied to sentence enhancements even where defendant objected in district court). "Courts can, and frequently do, deal with rough estimates, and as such, a party dissatisfied with a sentencing court's quantification of the amount of loss . . . must go a long way to demonstrate clear error." United States v. Rowe, 202 F.3d 37, 42 (1st Cir. 2000) (internal citations omitted).

Golenbock and Stein argue that the district court's calculation was flawed because it did not take into account the more than five years of "carrying costs" that defendants had paid while the property grew in value from its $120,000 purchase price in 1990 to its $175,000 sale price in 1996. During this time period, Golenbock and Stein made insurance and mortgage payments totaling approximately $70,000. Golenbock and Stein argue that the creditors reaped the benefit of an increase in the value of the property that was created by Golenbock and Stein's payments.

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bankruptcy trustee and that the proceeds of the property's sale were recovered.

Golenbock and Stein argue there was no intended loss whatsoever, because the amount they paid to carry the property over the five years approximately equaled the net value in 1996. Had they kept the sales proceeds, their net would be zero after subtracting the payments they made.

But we believe the district court's intended loss calculation was justifiable and well within the standards of the Sentencing Guidelines and relevant case law. Section 2F1.1 of the Guidelines provides that an offense level shall be increased by six levels if the loss or intended loss amounts to more than $70,000. Intended loss need not be determined with precision; "[t]he court need only make a reasonable estimate of the loss, given the available information.'" United States v. Pervaz, 118 F.3d 1, 10 (1st Cir. 1997) (quoting U.S.S.G. § 2F1.1, cmt. (n.8)); see also United States v. Parsons, 141 F.3d 386, 392 (1st Cir. 1998) (loss is a proxy for the seriousness of the offense). Section 2F1.1 does not otherwise specify or restrict the means by which intended loss may be calculated in a bankruptcy case. Compare U.S.S.G. § 2F1.1 cmt (n.8) (providing special rules for calculating loss in particular types of cases, including loan fraud).[8]

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[8] Golenbock and Stein seek to bolster their argument by relying on loan fraud cases and the Sentencing Guidelines commentary on loan fraud. The Guidelines recognize loan fraud as a specific exception to the usual methods of calculating loss set forth in §§ 2F1.1 and 2B1.1. See U.S.S.G. § 2F1.1 cmt. (n.8(b)). We find no error in the district courts refusal to extend the exceptional methodology used for loan fraud cases to bankruptcy fraud.

Here, it was reasonable for the district court to treat the $74,000 net gain realized on the 1996 sale of the property as the measure of the creditors' intended loss. For each of the five previous years during which Golenbock and Stein held it, their exclusive control gave them the economic use of the property in addition to the profit they later realized when the property was sold. Golenbock and Stein could rent the property to others and on occasion did so. In lieu of renting it, they could and did themselves enjoy its use. In either event the property, during all of the years when they were paying the carrying charges, had immediate value to those who controlled it, just as ownership of one's home provides continuous economic value distinct from the capital gain when the home is eventually sold. In the circumstances, we think the district court could reasonably treat the economic value of the property during the years Golenbock and Stein fraudulently withheld it from their creditors as offsetting its carrying expenses, leaving the $74,000 net gain on the 1996 sale as the amount Golenbock and Stein would have realized had the fraud succeeded and, conversely, as the loss the fraud would have caused to the creditors had the scheme worked. Golenbock and Stein clearly never intended by paying the mortgage and other expenses to benefit their creditors; during this period they alone retained the exclusive right to the property's use. We do not find clear error in the district court's refusal to subtract Golenbock and Stein's annual payments from the $74,000.

Nor is there error in the fact that the court evaluated the intended loss at the time Golenbock

and Stein sold the Wellfleet property, rather than at the time they filed for bankruptcy. Like conspiracy, bankruptcy concealment has been described as a continuing offense. See 18 U.S.C. § 3284;[9] United States v. Gilbert, 136 F.3d 1451, 1453 (11th Cir. 1998); Sultan v. United States, 249 F.2d 385, 386 (5th Cir. 1957) (noting that § 3284, in addition to describing a statute of limitations, has substantive consequences). "[C]oncealment by its nature is an act which goes on until detected or its consequences are purged." Sultan, 249 F.2d at 386. The fraud was still ongoing at the time the Wellfleet property was sold, as the concealment had not yet been revealed at that point. Hence, it was proper for the court to base its intended loss findings on the value of the property at the time of the sale.

C. *Sentencing enhancement (Stein)*

The district court found that Stein was "an organizer, leader, manager, or supervisor" for the purposes of U.S.S.G. § 3B1.1(c), and accordingly added two levels to her base offense level. Stein argues that the evidence does not support the district court's conclusion. Because a sentencing court's role-in-the-offense determination is

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[9] Section 3284 provides:

> The concealment of assets of a debtor in a case under title 11 shall be deemed to be a continuing offense until the debtor shall have been finally discharged or a discharge denied, and the period of limitations shall not begin to run until such final discharged or denial of discharge.

necessarily fact-specific, we review deferentially and only for clear error or mistake of law. See United States v. Alicea, 205 F.3d 480, 485 (1st Cir. 2000).

The government must prove by a preponderance of the evidence that Stein's role satisfies the requirements of § 3B1.1(c). See id. at 485. A two-level increase pursuant to § 3B1.1(c) is justified if the sentencing court supportably finds that (1) the criminal enterprise involved at least two complicit participants (of whom the defendant may be counted as one), and (2) the defendant, in committing the offense, exercised control over, organized, or was otherwise responsible for superintending the activities of, at least one of those other persons.

United States v. Cruz, 120 F.3d 1, 3 (1st Cir. 1997) (en banc). In determining whether the defendant qualifies for the enhancement, the Sentencing Guidelines instruct courts to consider seven factors:

> the exercise of decision making authority, the nature of participation in the commission of the offense, the recruitment of accomplices, the claimed right to a larger share of the fruits of the crime, the degree of participation in planning or organizing the offense, the nature and scope of the illegal activity, and the degree of control exercised over others.

U.S.S.G. § 3B1.1 cmt. (n.4). This list of factors is "representative rather than exhaustive." United States v. Tejada-Beltran, 50 F.3d 105, 111 (1st Cir. 1995).

Stein opposed this enhancement in objections to the presentence report (PSR) and at sentencing. On appeal, Stein makes a very brief and general argument that the sentencing enhancement was erroneous because there was no evidence that she supervised or managed Otis's criminal conduct. We perceive no clear error.

The court could have reasonably found that Stein, together with Golenbock, devised and carried out a plan to conceal the Wellfleet property from bankruptcy creditors and the trustee by having Otis hold it for them in trust. Stein signed the backdated deed of the Wellfleet property to Otis. Stein met with the bankruptcy attorney, provided the information for her filing and attended the meetings of creditors. After they conveyed title to Otis, Stein and Golenbock forwarded the tax forms to her.

The testimony of Stein's and Golenbock's secretaries reflects that Stein as well as Golenbock exercised continuing decision-making authority with respect to the Wellfleet property. Stein paid or authorized the payment of bills, sometimes with handwritten directions on the bills. And with Golenbock, Stein received tax documents and insurance forms at her address. Stein and Golenbock made the arrangements with the real estate broker when the property was being sold. When the proceeds for the sale of the

Wellfleet property were issued to Otis, amounting to more than $70,000, Otis signed them over to accounts from which Stein benefitted.

It is true that there is little evidence that Stein alone -- i.e., acting separately from Golenbock - directed Otis's activity related to the concealment. However, Stein does not contend that two organizers cannot act jointly to direct the activity of another, and we have found no authority so stating. Hence, we perceive no clear error in the district court's determination that Stein was a leader, supervisor, organizer or manager of Otis.

D. ***Sufficiency of the evidence (Stein and Otis)***

On appeal, Stein and Otis challenge the sufficiency of the evidence presented against them. It is well-established that in order to challenge the sufficiency of the evidence after a conviction, the defendant must have preserved her Rule 29 motion by moving for an acquittal at the close of the defense's evidence at trial. See United States v. Castro-Lara, 970 F.2d 976, 980 & n.2 (1st Cir. 1992); United States v. Concemi, 957 F.2d 942, 950 (1st Cir. 1992).

> Absent a renewal of the motion for acquittal after presenting the case for the defense, the motion for acquittal is considered waived. Hence, in order to prevail on a challenge to the sufficiency of the evidence, "the

> defendants must then demonstrate "clear and gross" injustice.'"

Concemi, 957 F.2d at 950 (internal citations omitted).

Here, Stein and Otis moved for acquittal under Fed. R. Crim. P. 29 at the close of the government's evidence. Neither afterward renewed her Rule 29 motion at the close of the defense's evidence. Hence, we apply the "clear and gross injustice" standard to this portion of Stein and Otis's appeal. See id. After careful review, we conclude that the evidence presented at trial against Stein and Otis was sufficient to support a guilty verdict beyond a reasonable doubt.

1. *Stein*

Stein argues that there was insufficient evidence to support her conviction because she simply "followed Golenbock's lead at every step of the way, without knowing that Golenbock was concealing the property from the bankruptcy trustee." She contends that the evidence showed that only Golenbock and Otis controlled the property. There is no support for the conclusion, Stein argues, that she knowingly retained an interest in the Wellfleet property or that she intentionally concealed (or conspired to conceal) it from her bankruptcy creditors. We disagree, based on reasonable inferences from other evidence described in section II.C., supra, as well as from the following evidence.

Stein filed her bankruptcy separately from Golenbock's. Stein's bankruptcy schedules and statement of financial affairs not only failed to list the Wellfleet property as a property in which she held an interest, but also failed to list the Cape Cod Five as a creditor, failed to disclose (as the forms required had Stein's interest been transferred, as claimed, the previous December) that she had previously been a part owner of the Wellfleet property within the year before she filed for bankruptcy, and failed to disclose the civil litigation relating to a hot tub at the Wellfleet property. In other words, there is evidence that even if Stein was unaware that she had retained a continuing interest in the Wellfleet property after the alleged December 31, 1989, transfer to Otis, she failed to make appropriate disclosure as to multiple relevant aspects of her relationship to the Wellfleet property, including her involvement before the transfer.

Stein attended 341 meetings and answered questions, affirming that the information contained in the schedules was truthful and accurate. Her bankruptcy attorney, Jeffrey Schreiber, testified that all the information on the schedules was obtained from Stein or Golenbock. Schreiber testified that he did not learn of the Wellfleet property from Stein or Golenbock, however, but from a B.B.O. attorney only a couple of years before the trial in this case.

Stein contended at trial that the Wellfleet property in fact was legitimately and wholly conveyed to Otis nine months before the bankruptcy filing. Sufficient evidence would have enabled a

reasonable jury to conclude otherwise, however. First, while the deed to Otis was dated and notarized nine months earlier, it was not recorded until October 4, 1990, a week after the filing of the individual bankruptcy petitions by Stein and Golenbock. Stein's testimony as to where the deed was signed and notarized was confused. She testified that the deed was signed and notarized in Andover, which is in Essex County, but on its face the deed indicates that it was executed and notarized in Middlesex County, where Golenbock and Stein resided. Second, Golenbock and Stein continued to pay the mortgage and other expenses relating to the property after December 31, 1989, strongly suggesting no actual transfer to Otis. They did not receive the stated consideration for the transfer. Their names were not changed on bills relating to the property until 1991. Stein conceded that she had never attempted to list the property for sale with a real estate broker, but had just talked to Otis, a close friend, about it. Additionally, the Declaration of Trust for the B.Z. Realty Trust, of which Otis was supposedly the trustee, was recorded only at the time the deed was recorded; this document was purported to have been executed on August 1 of either 1989 or 1990 (both dates appeared on it). From this evidence, the jury could have concluded that Stein had never transferred nor intended to transfer her interest in trust to Otis on December 31, 1989, prior to the bankruptcy. Indeed, the jury could have determined that, even if prepared on that date, the deed was not delivered then or that it may even have been made later and backdated, after Golenbock and Stein had filed for bankruptcy. In any case, the

evidence suggests that the deed had been fabricated as part of defendants' scheme to conceal the property from bankruptcy creditors.

Stein testified that between 1992 and 1994, the Wellfleet property payments were all made from the Adams Street Trust account because Otis had purchased the beneficial interest in that trust. This testimony was corroborated by that of her secretary, Beverly Rubin. However, neither Stein nor Rubin provided any supporting documents. Furthermore, there was contradictory evidence: checks and other payments relating to the Wellfleet property, made during that time period, from accounts and sources other than the Adams Street Trust account, including their bankruptcy debtor-in-possession checking account. In addition, Stein's signature appears on non-Adams Street Trust checks in the early 1990s on payments for the Wellfleet property, after the property was sold to Otis. Furthermore, after Stein and Golenbock received their bankruptcy discharges, but while their bankruptcy cases were still open, they began paying the Cape Cod Five loans directly from an account in Golenbock's name. Two of those checks were signed by Stein in October, 1995. Moreover, despite the stated consideration of $108,000, no funds appear to have changed hands as between Otis and the purported sellers, nor was the Cape Cod Five notified of the purported sale to Otis.

Hence, the jury could have concluded that the sale to Otis was a sham and that Golenbock and Stein paid the Wellfleet expenses from their own funds, and that Stein's testimony at trial about

the payments was false. See United States v. Jimenez-Perez, 869 F.2d 9, 11 (1st Cir. 1989) (the jury "could legitimately have presumed that the fabrication was all the more proof of [defendants'] guilt"). As the evidence was sufficient for the jury to have concluded that Stein knowingly and fraudulently concealed her interest in the Wellfleet property from her bankruptcy creditors, and conspired with Golenbock and Otis to do so, there was no clear and gross injustice in her conviction.

2. *Otis*

Otis argues that there was insufficient evidence that she willfully joined the conspiracy to conceal the Wellfleet property from Golenbock's and Stein's bankruptcy creditors. She contends that she was unaware of any improprieties throughout the concealment scheme, and hence lacked the requisite intent to be convicted of conspiracy. We hold that a reasonable jury could have concluded otherwise.

The government points out that Golenbock and Otis were close friends and Golenbock was a godmother to one of Otis's sons. This alone, of course, would be insufficient to establish that Otis knew of the concealment, although, together with other probative evidence, it might be a further factor making such knowledge more likely. The government points out that Golenbock issued a $15,000 check to Otis a few days after the bankruptcy filing, then recorded the earlier-dated deed of the Wellfleet property to Otis one

week later. From this, the government argues, the jury could have found that Otis knowingly was being paid to hold the property for Golenbock's and Stein's benefit.

Precisely when Otis's involvement began is not critical. "[I]t is well settled that one may join a conspiracy subsequent to its original formation by adopting its goals and adhering to its purposes." United States v. Spock, 416 F.2d 165, 191 (1st Cir. 1969) (citing Blumenthal v. United States, 332 U.S. 539, 559, 68 S.Ct. 248, 92 L.Ed. 154 (1947)). Where a defendant knows of the bankruptcy and holds or disposes of assets for the debtor, the evidence is "sufficient to warrant the jury's inferring purposeful knowledge and participation in the plan first set in motion previously" by the debtor. Sultan, 249 F.2d at 387. Here, even if Otis had been unaware of the concealment at the time of the conveyance, there is ample circumstantial evidence for a jury to find that she later was knowingly and willfully involved in the conspiracy.

First, there is evidence that Otis knew of the bankruptcy proceedings during the time period that she held the Wellfleet property in trust (August 1989 or August 1990 to June 1996). In 1992, Otis submitted a pleading from Golenbock's bankruptcy case to the IRS. Moreover, she admitted her awareness of the bankruptcy in her B.B.O. deposition in January, 1996.

Second, there was evidence that Otis, who was an attorney herself, would have known that the circumstances of the transfer and subsequent

handling of the Wellfleet property were irregular. The jury could have inferred that as the supposed purchaser of the property, Otis was aware that the purported transfer to her was a sham. She admitted that she made none of the expense payments for the property and was not involved in renting it. Although the deed stated she took the property subject to the Cape Cod Five's two mortgages, Otis never received mortgage bills, as they were sent to Golenbock and Stein's office. When the decision was made to sell the property, Golenbock and Stein, not Otis, conducted the communications with the broker. And when the property was sold, Otis turned over all the proceeds to Golenbock's and Stein's minor son.

Moreover, there is evidence that Otis actively attempted to cover up these irregularities. Although she acknowledged that she did not provide any of the funds to pay the loans, she fraudulently claimed the mortgage interest deduction for several years on her federal income tax returns. Furthermore, Otis made false statements in a B.B.O. deposition about the matter. The jury saw the transcripts and heard the tapes of her testimony, from which they could have drawn additional negative inferences both to her credibility and her culpability. See Jimenez-Perez, 869 F.2d at 11.

In sum, there is evidence from which the jury could have reasonably concluded that Otis knew of the bankruptcy and participated in the conspiracy to conceal the Wellfleet property. Hence, there was no clear and gross injustice in her conviction.

E. *Defective Indictment (Otis)*

Otis was convicted only on the conspiracy charge, set forth in Count II of the superseding indictment. She now contends that Count II failed to adequately inform her of which paragraph of 18 U.S.C. § 152 was charged. Because she did not challenge the sufficiency of the indictment below, we review for plain error only. See United States v. Murphy, 762 F.2d 1151, 1155 (1st Cir. 1985); Fed. R. Crim. P. 52(b).

Count II charges that Otis, Golenbock and Stein "did knowingly, willfully, and unlawfully conspire and agree among themselves to commit the following offense against the United States:

> to knowingly and fraudulently conceal from creditors and the trustee in bankruptcy proceedings under Title 11 of the United States Code (the bankruptcy laws), captioned In re: Wendy B. Golenbock, case number 90-41635-JFQ and In re: Cheryl B. Stein, case number 90-41638-JFQ, in the United States Bankruptcy Court for the District of Massachusetts, property belonging to the estates of the debtors WENDY B. GOLENBOCK and CHERYL B. STEIN, to wit, their beneficial interest in the real property located on Bond Street in Wellfleet, Massachusetts (also at times referred to as South Wellfleet), also identified at times as being on Old Wharf Road or Paine Avenue or

> lots 63 and 80, and their agreement with SUSAN OTIS, aka SUSAN ALEKMAN concerning her holding that real property in trust for the benefit of WENDY B. GOLENBOCK and CHERYL B. STEIN, all in violation of Title 18, United States Code Sections 152 and 2.

(Emphasis added.)

Otis argues that in Count II, the statement "all in violation of 18 U.S.C. § 152 and 18 U.S.C. § 2" was not clear enough to notify her of what crimes she was alleged to have committed. An indictment is sufficient "if the offense is described with sufficient clarity to show a violation of law, and enables the accused to know the nature and cause of the accusation against him and to plead an acquittal or conviction in bar of future prosecution for the same offense." United States v. Fusaro, 708 F.2d 17, 23 (1st Cir. 1983) (citing Hamling v. United States, 418 U.S. 87, 94 S.Ct. 2887, 41 L.Ed.2d 590 (1974)). Generally, an indictment passes muster if it sets forth the offense in the words of the statute, including all the elements of the offense. See United States v. Penagaricano-Soler, 911 F.2d 833, 839 (1st Cir. 1990).

18 U.S.C. § 152 (App. 1994), the version of the statute under which defendants were charged, describes several forms of criminal conduct in the bankruptcy context, including concealment of

assets, false oaths and claims, and bribery.[10] Otis was charged with a violation of the first provision (now the first paragraph) of § 152, prohibiting concealment of assets, which sets forth in relevant part:

> Whoever knowingly and fraudulently conceals from the receiver, custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any bankruptcy proceeding, any property belonging to the estate of a bankrupt;
>
> . . . Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Count II of the superseding indictment tracks the above-cited paragraph with sufficient clarity to place Otis on notice of the elements of the charged offense. See United States v. Grant, 971 F.2d 799, 802 (1st Cir. 1992) (elements of bankruptcy concealment are knowing concealment of property of one's bankruptcy estate from the bankruptcy trustee, with specific intent to defraud creditors). Count II sets forth the time and place of offense, identifies the

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[10] Before it was amended in 1994, 18 U.S.C. § 152 did not contain paragraph numbers. See Pub.L. 103-394, § 312(a)(1)(A). The amended statute applies only to bankruptcy cases filed with the bankruptcy court after October, 1994. See id. at § 702. As Golenbock and Steins bankruptcy petitions were filed in September, 1990, we apply the earlier version of the statute.

relevant bankruptcy proceedings at issue, the property alleged to have been concealed, and the persons from whom it was concealed. See United States v. Arge, 418 F.2d 721, 724 (10th Cir. 1969) (an indictment for bankruptcy concealment must allege time and place, knowing and fraudulent intent, a description of the property concealed, the persons from whom it was concealed, and that it was property of the bankrupt estate). Moreover, the indictment identifies the intent: that Otis "knowingly, willfully, and unlawfully" conspired to commit the offense, and that she "knowingly and fraudulently" concealed the property. See id. Hence, we conclude that the charging language in Count II adequately set forth both the language and elements of the first paragraph of 18 U.S.C. § 152 and informed Otis of the relevant offense.

Otis also contends that the indictment was defective because it cited to 18 U.S.C. § 2 without setting forth its specific language.[11] Charges

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[11] Section 2 provides:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.
>
> (b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

We have stated that § 2 is a general definitional statute that does not describe a separate offense from the underlying substantive crime. See United States v. Mitchell, 23 F.3d 1, 2 (1st Cir. 1994).

under § 2 need not be specifically referenced in an indictment, however. See United States v. Footman, 215 F.3d 145, 153-54 (1st Cir. 2000); United States v. Andrade, 135 F.3d 104, 110 (1st Cir. 1998). Hence, there is no error, plain or otherwise, in the omission of the specific language of § 2, and we affirm Otis's conviction on the indictment.

Affirmed.

APPENDIX B

United States District Court
District of Massachusetts

United States of America	)
v.	)
Wendy B. Golenbock, Cheryl B. Stein and Susan Otis a/k/a Susan Alekman,	) Criminal Action No. 98-40004-NMG
Defendants.	) **DOCKETED**

MEMORANDUM & ORDER

GORTON, J.

On August 6, 1998, the grand jury returned a two-count superceding indictment charging the defendants, Wendy B. Golenbock ("Golenbock"), Cheryl B. Stein ("Stein") and Susan Otis ("Otis"), with bankruptcy fraud in violation of 18 U.S.C. § 152 and conspiracy to commit bankruptcy fraud in violation of 18 U.S.C. § 371. Pending before this Court are the motions of 1) Golenbock to suppress statements made to the Board of Bar Overseers 2) Otis to sever and 3) Stein for relief from prejudicial misjoinder. Those motions will be addressed below seriatum.

I. Background

The indictment alleges the following facts. During the relevant time period Golenbock and Otis were attorneys licensed to practice law in Massachusetts. In 1982, Golenbock and a friend purchased certain real property located on Bond Street in Wellfleet, Massachusetts ("the Bond Street property") and thereafter obtained from the Cape Cod Five Cents Savings Bank ('Five Cents Savings") a loan of about $56,700 secured by that property.

In 1986, Golenbock and Stein purchased the friend's interest in the Bond Street property for $34,050 and then obtained a $50,000 home equity loan from Five Cents Savings secured by the property. In 1989 or 1990, Golenbock and Stein transferred title to the Bond Street property to the B.Z. Realty Trust ("the Trust") of which Otis was a trustee. Although the deed stated that the property was sold for $108,000, neither the Trust nor Otis paid that amount, and Five Cents Savings was not notified of the transfer. Although the deed purports to have been executed either on August 1, 1989 or August 1, 1990, it was not recorded in the Barnstable Registry of Deeds until October 4, 1990. Golenbock and Stein continued to make the mortgage payments, pay the service charges on the home equity line and pay for utilities, trash pickup and property insurance on the property after its transfer and until it was sold in June, 1996.

In September, 1990, Golenbock and Stein filed Chapter 11 bankruptcy petitions in the United States Bankruptcy Court for the District of Massachusetts in Worcester. They omitted from their schedules of assets and debts their interest in the Bond Street property as well as their debt to Five Cents Savings and failed to disclose their transfer of the property in their Statements of Financial Affairs, which required them to list all transfers of property outside the ordinary course of business during the preceding year. At meetings of creditors, they answered questions under oath but failed to disclose their interest in the Bond Street property, the transfer of that property to the Trust and the debt to Five Cents Savings.

The Chapter 11's of Golenbock and Stein were ultimately converted to Chapter 7 proceedings, and, in April, 1995, the Bankruptcy Court entered orders discharging their respective debts. Those cases were closed in March, 1996. In June, 1996, Otis sold the Bond Street property, paid off the outstanding liens and then signed over the remaining proceeds of more than $70,000 to Max Stein, the adopted son of Golenbock and Stein.

Based upon those facts, the indictment alleges one count of bankruptcy fraud and one count of conspiracy to commit bankruptcy fraud.

II. Golenbock's Motion to Suppress Statements Made to the Massachusetts Board of Bar Overseers

In 1995, counsel for the Massachusetts Board of Bar Overseers ("BBO") commenced an ethics investigation into certain conduct of Golenbock. Golenbock was deposed seven times during that investigation. At her second deposition, on the advice of counsel, Golenbock asserted her 5th Amendment privilege rather than answer certain questions. Later, upon learning that the BBO could draw adverse inferences from her refusal to answer questions and that she risked disbarment as a result of those adverse inferences, Golenbock decided to waive her privilege and to testify fully. She now alleges that her full testimony was coerced and is, therefore, inadmissible.

In arguing that her testimony was coerced, Golenbock relies upon a line of cases beginning with Garrity v. New Jersey, 385 U.S. 492 (1967), which expanded the definition of coerced testimony under the Fourteenth Amendment to include mental as well as physical coercion. In Garrity, the Supreme Court held that, where state law mandated the automatic discharge of any employee who refused to testify based upon his Fifth Amendment privilege, the testimony of police officers before an investigatory body was involuntary. Id. at 498. Because the officers in that case were forced to choose "between the rock and the whirlpool," they were under duress when

they waived their Fifth Amendment privilege and their testimony was unconstitutionally compelled. Id. at 498; see generally United States v. Perez-Franco, 873 F.2d 455, 462-63 (1st Cir. 1989) (summarizing the line of Supreme Court cases holding that "government cannot penalize assertion of the constitutional privilege against compelled self-incrimination by imposing sanctions to compel testimony which has not been immunized" (quoting Lefkowitz v. Cunningham, 431 U.S. 801, 806 (1977))).

In defining coerced testimony, the Supreme Court distinguishes between proceedings in which "silence in and of itself is insufficient to support an adverse decision" and those coercive circumstances "where refusal to submit to interrogation and to waive the Fifth Amendment privilege, standing alone and without regard to the other evidence, resulted in loss of employment." Baxter v. Palmigiano, 425 U.S. 308, 317-18 (1967)(holding that adverse inference drawn from inmate's silence in a prison disciplinary proceeding did not violate his Fifth Amendment privilege against self-incrimination).

Where no penalty is imposed directly for assertion of the Fifth Amendment privilege, it is incumbent upon the defendant or witness to assert her privilege if she wishes to prevent the admission of her testimony in a subsequent criminal action. See United States v. Jenkins, 785 F.2d 1387, 1392-93 (9th Cir. 1986); United States v. White, 589 F.2d 1283, 1285-87 (5th Cir.

1979); see also Arthurs v. Stern, 560 F.2d 477, 478-79 (1st Cir. 1977)(stating that there is nothing "inherently repugnant to due process in requiring (a) doctor to choose between giving testimony at the disciplinary hearing, a course that may help the criminal prosecutors, and keeping silent, a course that may lead to the loss of his license").

In this case, Golenbock did not face the ominous choice "between the rock and the whirlpool," because, although she was subject to a negative inference based upon her silence, she was not subject to automatic disbarment. Instead, in the BBO proceeding she, like defendants in any civil proceeding, had to choose between remaining silent and risking an adverse inference on the one hand, and giving testimony that could be used against her in a subsequent criminal proceeding on the other. Because Golenbock's testimony was not coerced, as that term is defined in Garrity, her motion to suppress statements made to the BBO will be denied.

III. Otis' Motion to Sever

The Supreme Court has held, in a case a propos to the one at bar, that:

> [W]hen defendants properly have been joined under [Fed.R.Crim.P.] 8(b), a district court should grant a severance under [Fed.R.Crim.P.] 14

> only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.

Zafiro v. United States, 506 U.S. 534, 539 (1993); see also United States v. Houlihan, 92 F.3d 1271, 1295 (1st Cir. 1996) (stating that the defendant must show "extreme prejudice" to prevail on a motion to sever).

Despite her general statements that 1) "the Government will introduce numerous other acts performed by the other codefendants" that will confuse the jury, 2) "there are documents which contain Otis' name and signature of which she has no knowledge . . . (which] will give rise to possible antagonistic defenses" and 3) the evidence at trial may demonstrate the greater culpability of her co-defendants, Otis alleges no specific facts from which this Court could conclude that she is prejudiced by her joinder with Golenbock in Stein. She alleges a "unique situation" in this case, but fails to describe that situation, and she indicates a potential Bruton problem, but identifies no particular statements of the co-defendants that incriminate her. See Bruton v. United States, 391 U.S. 123 (1968). This Court will, therefore, deny her motion to sever.

IV. Stein's Motion for Relief From Prejudical Misjoinder

Stein, just as Otis, fails to allege any specific facts in support of her contention that she is prejudiced by her joinder with her co-defendants in this action. This Court will, therefore, deny her motion for relief from prejudicial misjoinder.

ORDER

For the foregoing reasons,

1) Golenbock's motion to suppress statements made to the Board of Bar overseers (Docket No. 41) is **DENIED**;

2) Otis' motion to sever (Docket No. 48) is **DENIED**; and

3) Stein's motion for relief from prejudicial misjoinder (Docket No. 51) is **DENIED**.

So ordered.

/s/
Nathaniel M. Gorton
United States District Judge

Dated: August 20, 1998

APPENDIX C

§2B1.1 GUIDELINES MANUAL November 1, 1998

2. *"Loss" means the value of the property taken, damaged, or destroyed. Ordinarily, when property is taken or destroyed the loss is the fair market value of the particular property at issue. Where the market value is difficult to ascertain or inadequate to measure harm to the victim, the court may measure loss in some other way, such as reasonable replacement cost to the victim. Loss does not include the interest that could have been earned had the funds not been stolen. When property is damaged, the loss is the cost of repairs, not to exceed the loss had the property been destroyed. Examples: (1) In the case of a theft of a check or money order, the loss is the loss that would have occurred if the check or money order had been cashed (2) In the case of a defendant apprehended taking a vehicle, the loss is the value of the vehicle even if the vehicle is recovered immediately.*

Where the offense involved making a fraudulent loan or credit card application, or other unlawful conduct involving a loan or credit card, the loss is to be determined under the principles setforth in the Commentary to §2F1.1 (Fraud and Deceit).

In certain cases, an offense may involve a series of transactions without a corresponding increase in loss. For example, a defendant may embezzle $5,000 from a bank and conceal this embezzlement by shifting this amount from one account to another in a series of nine transactions over a six-month period. In this example, the loss is $5,000 (the amount taken), not $45,000 (the sum of the nine transactions), because the additional transactions did not increase the actual or potential loss.

In stolen property offenses (receiving, transporting, transferring, transmitting, or possessing stolen, property), the loss is the value of the stolen property determined as in a theft offense.

In an offense involving unlawfully accessing, or exceeding authorized access to a "protected computer" as defined in 18 U.S.C. § 1030(e)(2)(A) or (B), "loss" includes the reasonable cost to the victim of conducting a damage assessment, restoring the system and data to their condition prior to the offense, and any lost revenue due to interruption of service.

In the case of a partially completed offense involving an offense involving a completed theft that is part of a larger, attempted theft) the offense level is to be determined in accordance with the provisions of § 2X1.1

(Attempt, Solicitation, or Conspiracy) whether the conviction is for the substantive offense, the inchoate offense (attempt, solicitation, or conspiracy), or both; see Application Note 4 in the Commentary to §2X1.1.

3. *For the purposes of subsection (b)(1), the loss need not be determined with precision. The court need only make a reasonable estimate of the loss given the available information. This estimate, for example, may be based upon the approximate number of victims and the average loss to each victim, or on more general factors such as the scope and duration of the offense.*

4. *The loss includes any unauthorized charges made with stolen credit cards, but in no event less than $100 per card. See Commentary to §§2X1.1 (Attempt, Solicitation, or Conspiracy) and 2F1.1 (Fraud and Deceit).*

PART F – OFFENSES INVOLVING FRAUD OR DECEIT

§2F1.1. Fraud and Deceit; Forgery; Offenses Involving Altered or Counterfeit Instruments Other than Counterfeit Bearer Obligations of the United States

(a) Base Offense Level: 6

(b) Specific Offense Characteristics

(1) If the loss exceeded $2,000, increase the offense level as follows:

Loss (Apply the Greatest)		Increase in Level
(A)	$2,000 or less	no increase
(B)	More than $2,000	add 1
(C)	More than $5,000	add 2
(D)	More than $10,000	add 3
(E)	More than $20,000	add 4
(F)	More than $40,000	add 5
(G)	More than $70,000	add 6
(H)	More than $120,000	add 7
(I)	More than $200,000	add 8
(J)	More than $350,000	add 9
(K)	More than $500,000	add 10
(L)	More than $800,000	add 11

Loss (Apply the Greatest)		Increase in Level
(M)	More than $1,500,000	add 12
(N)	More than $2,500,000	add 13
(O)	More than $5,000,000	add 14
(P)	More than $10,000,000	add 15
(Q)	More than $20,000,000	add 16
(R)	More than $40,000,000	add 17
(S)	More than $80,000,000	add 18

Commentary

Statutory Provisions: 7 U.S.C. §§6, 6b, 6c. 6h, 6o, 13, 23; 15 U.S.C. §§50, 77e, 77q, 77x, 78j, 78ff, 80b-6, 1644; 18 U.S.C. §§225, 285-289, 471-473, 500, 510, 659, 1001-1008,1010-1014,1016-1022, 1025, 1026, 1028, 1029, 1030(a)(4), 1031, 1341-1344, 2314, 2315. For additional statutory provision(s), see Appendix A (Statutory Index).

Application Notes:

8. *Valuation of loss is discussed in the Commentary to §2B1.1 (Larceny, Embezzlement, and Other Forms of Theft). As in theft cases, loss is the value of the money, property, or services unlawfully taken; it does not, for example, include interest the victim could have earned on such funds had the offense not occurred. Consistent with the provisions of §2X1.1 (Attempt, Solicitation, or Conspiracy), if an intended loss that the defendant was attempting to inflict can be determined, this*

figure will be used if it is greater than the actual loss. Frequently, loss in a fraud case will be the same as in a theft case. For example, if the fraud consisted of selling or attempting to sell $40,000 in worthless securities, or representing that a forged check for $40,000 was genuine, the loss would be $40, 000.

There are, however, instances where additional factors are to be considered in determining the loss or intended loss:

(b) *Fraudulent Loan Application and Contract Procurement Cases*

In fraudulent loan application cases and contract procurement cases, the loss is the actual loss to the victim (or if the loss has not yet come about, the expected loss). For example, if a defendant fraudulently obtains a loan by misrepresenting the value of his assets, the loss is the amount of the loan not repaid at the time the offense is discovered, reduced by the amount the lending institution has recovered (or can expect to recover) from any assets pledged to secure the loan. *However, where the intended loss is greater than the actual loss, the intended loss is to be used.*

In some cases, the loss determined above may significantly understate or overstate the seriousness of the defendant's conduct. For

example, where the defendant substantially understated his debts to obtain a loan, which he nevertheless repaid, the loss determined above (zero loss) will tend not to reflect adequately the risk of loss created by the defendant's conduct. Conversely, a defendant may understate his debts to a limited degree to obtain a loan (e.g., to expand a grain export business), which he genuinely expected to repay and for which he would have qualified at a higher interest rate had he made truthful disclosure, but he is unable to repay the loan because of some unforeseen event (e.g., an embargo imposed on grain exports) which would have caused a default in any event. In such a case, the loss determined above may overstate the seriousness of the defendant's conduct. Where the loss determined above significantly understates or overstates the seriousness of the defendant's conduct, an upward or downward departure may be warranted.